

United States  
Circuit Court of Appeals

For the Ninth Circuit. 9

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COMMISSIONER OF INTERNAL REVENUE,  
Petitioner,

vs.

RICHARD S. McCREERY,  
Respondent.

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Transcript of the Record

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Upon Petition to Review an Order of the United States  
Board of Tax Appeals.

FILED

APR 21 1936

PAUL P. O'BRIEN,



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## APPEARANCES

For Taxpayer:

JOHN C. ALTMAN, Esq.,

For Comm'r:

GEO. D. BRABSON, Esq.

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Docket No. 73322

RICHARD S. McCREERY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

## DOCKET ENTRIES.

1933

Aug. 12—Petition received and filed. Taxpayer notified. (Fee paid)

“ 12—Copy of petition served on General Counsel.

Sep. 22—Answer filed by General Counsel.

Oct. 2—Copy of answer served on taxpayer.

1934

Apr. 18—Hearing set week of July 2, 1934 at San Francisco, Calif.

Jul. 13—Hearing had before Mr. Morris on merits. Stipulation of facts filed. Briefs due Sept. 15, 1934.

“ 24—Transcript of hearing 7/13/34 filed.

1934

Sep. 12—Brief and proposed findings of facts filed by taxpayer. 9/12/34 copy served.

“ 14—Brief filed by General Counsel.

Oct. 22—Motion for leave to file reply brief, reply brief lodged, filed by taxpayer. 10/24/34 granted—10/26/34 copy served.

1935

Jun. 19—Memorandum opinion rendered, Mr. Logan Morris, Div. 14. Decision will be entered under Rule 50.

Jul. 1—Notice of final settlement filed by taxpayer.

“ 2—Hearing set July 24, 1935 under Rule 50.

“ 5—Copy of notice of settlement and notice of hearing served on General Counsel.

“ 17—Notice of settlement filed by General Counsel.

“ 27—Decision entered, Div. 14. Logan Morris.

Sep. 23—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by General Counsel.

Oct. 10—Proof of service filed.

“ 29—Statement of evidence lodged.

Nov. 15—Motion for extension to file objections to statement of evidence and extension for hearing on statement filed by taxpayer. 11/16/35 granted and set for hearing 12/4/35.

“ 16—Notice of lodgment of statement and of hearing on Nov. 18, 1935 or thereafter filed by General Counsel. Proof of service thereon.



1935

- Nov. 16—Praecipe with proof of service thereon filed.
- “ 21—Motion for extension to Jan. 23, 1936 to complete and transmit record filed by General Counsel.
- “ 21—Order enlarging time to Jan. 23, 1936 to prepare evidence and deliver record sur petition for review entered. [1\*]
- “ 26—Objections and amendments to statement of evidence lodged.
- “ 26—Notice of lodgment of objections and amendments to statement with hearing notice 12/2/35 filed.
- Dec. 4—Hearing had before Mr. Logan Morris, Div. 14 on approval of statement of evidence.
- “ 9—Order that objections numbered 1, 2, 3, 5, 7, 6, 8, 9, 10, 11, 12, 13, 14 and 16 be sustained and that objections 4 and 15 be overruled and that statement of evidence be prepared in accordance herewith entered.
- “ 28—Statement of evidence approved and ordered filed. [2]

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\*Page numbering appearing at the foot of page of original certified Transcript of Record.

## United States Board of Tax Appeals

No. 73322

RICHARD S. McCREERY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

## PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:E-2-WPE-60D) dated June 29, 1933, and as the basis of his proceedings, alleges as follows:

## I.

The petitioner is an individual, with his address and office at 155 Montgomery Street, San Francisco, California.

## II.

The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the taxpayer on June 29, 1933. The report of the Internal Revenue Agent in charge at San Francisco, California, dated [3] October 26, 1932, and transmitted to the taxpayer under date of November 17, 1932, was approved in said notice of deficiency and made a part thereof, and accordingly a copy of said report is attached and marked Exhibit "B".

### III.

The amount of the deficiency determined by the commissioner is the sum of \$7162.98, and represents additional individual income taxes of petitioner for the calendar year 1930; of said deficiency, the sum of approximately \$5,000.00 is in controversy.

### IV.

The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) In determining the taxable net income of the petitioner for the year 1930, respondent erroneously disallowed a loss sustained by petitioner in that year in the sum of \$12,783.47, arising out of the sale by petitioner of 957 shares of the capital stock of Standard Oil Company of California. In this behalf, petitioner sets forth that of said loss in the sum of \$12,783.47, \$7914.47 represented a "capital loss", within the purview of Section 101 of the Revenue Act of 1928, and \$4869.00 thereof represented an ordinary loss, deductible from gross income of petitioner.

(b) In determining the taxable net income of petitioner for the year 1930, respondent erroneously disallowed a loss sustained by petitioner in that year [4] in the sum of \$22,263.40 arising out of the sale by petitioner of 661 shares of the capital stock of Transamerica Corporation. In this behalf, petitioner sets forth that of said loss in the sum of \$22,263.40, \$18,638.00 represented a "capital loss", within the purview of Section 101 of the Revenue

Act of 1928, and \$3625.40 thereof represented an ordinary loss deductible from gross income of petitioner.

(c) In determining the taxable net income of petitioner for the year 1930, respondent erroneously disallowed a loss sustained by petitioner in that year in the sum of \$2455.00 arising out of the sale by petitioner of 160 shares of common stock of Caterpillar Tractor Company. In this behalf, petitioner sets forth that said sum of \$2455.00 represents an ordinary loss deductible from gross income of petitioner for the year 1930.

#### V.

The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) At various times during the period commencing with December 2, 1926, and ending on March 30, 1928, petitioner purchased an aggregate of 725 shares of the capital stock of Standard Oil Company of California, for which said shares of stock petitioner paid the aggregate sum of \$41,046.47. Petitioner continuously held and owned said shares of stock from the time of the respective dates of acquisition until December 30, 1930. During the years 1929 and 1930, petitioner as the owner of said 725 [5] shares of stock received as stock dividends thereon an aggregate of 28 shares of stock, making a total ownership of 753 shares of stock on December 30, 1930. On December 30, 1930, petitioner sold said 753 shares of the capital stock

of Standard Oil Company of California to Burlingame Investment Company, a corporation, for the sum of \$33,132.00 and by reason thereof, taxpayer sustained during the year 1930 a "capital loss" in the sum of \$7914.47, within the purview of Section 101 of the Revenue Act of 1928.

On May 23, 1930, petitioner purchased 200 shares of the capital stock of Standard Oil Company of California for the sum of \$13,845.00. By reason of the ownership of said 200 shares of stock, taxpayer received on December 15, 1930, a dividend of 4 shares of stock, making a total ownership of 204 shares. On December 30, 1930, petitioner sold said 204 shares of the capital stock of Standard Oil Company of California to Burlingame Investment Company, a corporation, for the sum of \$8976.00, and as a result thereof, petitioner sustained during the year 1930 a loss in the sum of \$4869.00.

Immediately prior to the sale of said 957 shares of stock of Standard Oil Company of California, the certificates evidencing all of said shares of stock stood of record in the name of petitioner. On December 30, 1930, petitioner duly endorsed all of said certificates of stock and delivered them to Burlingame Investment Company, and on December 30, 1930 said Burlingame Investment Company delivered said certificates of stock, thus endorsed, to the Stock Transfer Office of [6] Standard Oil Company of California at San Francisco, California, with instructions to issue said 957 shares of

stock in the name of Burlingame Investment Company and pursuant to such instructions, said Standard Oil Company of California issued as of December 30, 1930, a new certificate or certificates evidencing said 957 shares of stock in the name of Burlingame Investment Company. Ever since the 30th day of December, 1930, said Burlingame Investment Company has continuously been and now is the sole owner of said 957 shares of the capital stock of Standard Oil Company of California.

(b) On October 17, 1928, petitioner purchased 200 shares of the capital stock of Transamerica Corporation for the sum of \$25,070.00. Petitioner continuously held and owned said shares of stock until December 30, 1930. During the years 1929 and 1930 taxpayer, as the owner of said 200 shares of stock, received as stock dividends an aggregate of 336 shares making a total ownership of 536 shares of stock on December 30, 1930.

On December 30, 1930, petitioner sold said 536 shares of the capital stock of Transamerica Corporation to Burlingame Investment Company, a corporation, for the sum of \$6432.00, and by reason thereof petitioner sustained during the year 1930 a "capital loss" in the sum of \$18,638.00, within the purview of Section 101 of the Revenue Act of 1928.

On January 8, 1929, petitioner, as the then [7] owner of the 200 shares of stock of Transamerica Corporation hereinabove referred to, received a dividend in kind thereof in the form of 5 shares of the capital stock of Bank of America of New York.



The fair market value of said 5 shares of stock of Bank of America of New York at date of acquisition was \$967.50, and therefore the cost basis to petitioner of said 5 shares of stock of Bank of America of New York was \$967.50. Shortly after the acquisition by petitioner of said 5 shares of stock of Bank of America of New York, he exchanged said shares of stock, in connection with a tax-free reorganization, for  $7\frac{1}{2}$  shares of the capital stock of Transamerica Corporation, which said last mentioned shares of stock likewise had a cost basis to petitioner of \$967.50. On March 4, 1929, petitioner purchased  $\frac{1}{2}$  share of Transamerica Corporation for the sum of \$62.50. On June 6, 1930, petitioner purchased  $\frac{8}{100}$  of a share of Transamerica Corporation for \$5.35 and in October, 1930, petitioner purchased  $\frac{77}{100}$  of a share of Transamerica Corporation for \$14.70. On June 3, 1930, petitioner purchased 100 shares of the capital stock of Transamerica Corporation for the sum of \$4075.35. During the years 1929 and 1930, petitioner, as the owner of said shares of stock of Transamerica Corporation, referred to in this paragraph, received as stock dividends thereon an aggregate of 16.15 shares of stock, making a total ownership of 125 shares of stock of Transamerica Corporation on December 30, 1930, which had a total cost basis to petitioner of \$5125.40.

[8]

On December 30, 1930, petitioner sold said 125 shares of the capital stock of Transamerica Corporation to Burlingame Investment Company, a cor-

poration, for the sum of \$1500.00 and by reason thereof, petitioner sustained during the year 1930 a loss in the sum of \$3625.40.

Immediately prior to the sale of said 661 shares of stock of Transamerica Corporation, the certificates representing all of said shares of stock stood of record in the name of petitioner. On December 30, 1930, petitioner duly endorsed all of said certificates of stock and delivered them to Burlingame Investment Company, and on December 30, 1930, said Burlingame Investment Company delivered said certificates of stock, thus endorsed, to the Stock Transfer Office of Transamerica Corporation at San Francisco, California, with instructions to issue said 661 shares of stock in the name of Burlingame Investment Company and, pursuant to such instructions, said Transamerica Corporation issued, as of December 30, 1930, a new certificate or certificates evidencing said 661 shares of stock in the name of Burlingame Investment Company. Continuously from December 30, 1930, until the month of February, 1932, said Burlingame Investment Company was the sole owner of said 661 shares of stock, at which said last mentioned time said Burlingame Investment Company sold said 661 shares on the open market and the proceeds of said last mentioned sale were received and retained solely by Burlingame Investment Company.

(c) On February 24, 1929, petitioner purchased [9] 160 shares of the capital stock of Caterpillar Tractor Company for the sum of \$6615.00. On De-



ember 30, 1930, petitioner sold said 160 shares of the capital stock of Caterpillar Tractor Company to said Burlingame Investment Company for the sum of \$4160 and as a result thereof, petitioner sustained during the year 1930 a loss in the sum of \$2455.00.

Immediately prior to the sale of said 160 shares of stock of Caterpillar Tractor Company, the certificates evidencing all of said shares of stock stood of record in the name of petitioner. On December 30, 1930, petitioner duly endorsed all of said certificates of stock and delivered them to Burlingame Investment Company, and on December 30, 1930, said Burlingame Investment Company delivered said certificates of stock, thus endorsed, to Bank of California, N. A., at San Francisco, California, the duly constituted Transfer Agent for the shares of stock of Caterpillar Tractor Company, with instructions to issue said 160 shares of stock in the name of Burlingame Investment Company. Pursuant to such instructions, said Transfer Agent caused to be issued as of December 30, 1930, a new certificate or certificates evidencing said 160 shares of stock in the name of Burlingame Investment Company. Ever since December 30, 1930, said Burlingame Investment Company has continuously been, and now is, the sole owner of said 160 shares of the capital stock of Caterpillar Tractor Company.

(d) Said Burlingame Investment Company was [10] organized as a corporation under the laws of the State of California on the 2nd day of June,

1924, with its office and principal place of business at San Francisco, and was formed by petitioner for the sole purpose of causing said corporation to acquire from petitioner all shares of stock and bonds then owned by petitioner in corporations which were organized under the laws of states other than California. The reason for such action was that at the time of the organization of Burlingame Investment Company petitioner was a resident of the State of California and stocks and bonds owned by petitioner in corporations organized under the laws of states other than California were subjected to inheritance and succession taxes by such other states, in the event of the death of taxpayer and in addition thereto, the requirements of the corporations organized under the laws of such other states were very onerous in connection with the transfer of such stocks, in the event of the death of petitioner.

At all times since its organization, said Burlingame Investment Company has kept separate and complete records and books of account of all securities and other property owned by it and of all transactions had by it, and has annually made its corporate income tax return to the Commissioner of Internal Revenue of the United States. Petitioner has at all times herein mentioned kept separate and complete records and books of account of all securities and other property owned by him and of all transactions had by him. [11] Said sales made by petitioner to Burlingame Investment Company as hereinabove set forth were contemporaneously with

the making of each of such sales appropriately entered and recorded on the books of account of petitioner and said purchases by Burlingame Investment Company from petitioner as hereinabove set forth were contemporaneously with the making of each of such purchases appropriately entered and recorded on the books of account of Burlingame Investment Company.

Each of said sales made by petitioner to Burlingame Investment Company was made at the fair market value of said respective shares of stock upon the date of sale, as evidenced by the listed price at such time on the San Francisco Stock Exchange. Each of said sales made in December, 1930, by petitioner to Burlingame Investment Company was a bona fide sale, without any restrictions or conditions, and ever since the respective time of each of said sales, petitioner has had and now has no interest of any kind or character in any of said shares of stock sold, or any proceeds that may accrue therefrom. At no time has there ever been any agreement or understanding, express or implied, nor is there now any such agreement or understanding between petitioner and Burlingame Investment Company for the return of any of said shares of stock by Burlingame Investment Company to petitioner or for the repurchase by petitioner from said Burlingame Investment Company of any of said shares of stock. [12]

## VI.

During the year 1931, petitioner paid to the Collector of Internal Revenue at San Francisco, California, the sum of \$5835.46 as and for income taxes for the calendar year 1930.

WHEREFORE, petitioner prays that this Board may hear the proceeding and determine that there is no deficiency in income taxes herein, and for such other relief as may be meet and proper in the premises.

JOHN C. ALTMAN,  
RICHARD S. GOLDMAN,  
Counsel for Petitioner,  
615 Russ Building,  
San Francisco, Calif.

State of California,  
City and County of San Francisco—ss.

JOHN C. ALTMAN, being first duly sworn, deposes and says: That the petitioner is sojourning outside of the United States. That affiant is the duly appointed attorney in fact of Richard S. McCreery, the petitioner above named, and that attached to the petition and marked Exhibit "C" is a copy of the power of attorney under which affiant is acting; that affiant is acting herein pursuant to the power conferred upon him by said power of attorney; that such power has not been revoked. [13]

For many years immediately last past, affiant has acted as attorney for petitioner and Burlingame

Investment Company, and affiant is fully familiar with all of the business affairs of petitioner and Burlingame Investment Company, and in particular affiant is familiar with the books of account of petitioner and Burlingame Investment Company and all of the facts surrounding the particular sales and transactions set forth in the foregoing petition.

That affiant has read the foregoing petition and is familiar with the statements therein contained and that the facts therein stated are true.

JOHN C. ALTMAN.

Subscribed and sworn to before me this 7th day of August, 1933.

[Seal]

LOUIS WIENER,

Notary Public in and for the City and County of San Francisco, State of California. [14]

EXHIBIT "A"  
TREASURY DEPARTMENT  
Washington

June 29, 1933

Office of  
Commissioner of Internal Revenue  
Address reply to  
Commissioner of Internal Revenue  
and refer to  
IT:AR:E-2  
WPE-60D

Mr. Richard S. McCreery,  
114 Sansome Street,  
San Francisco, California.

Sir:

You are advised that the determination of your tax liability for the year(s) 1930 discloses a deficiency of \$7,162.98, as shown in the statement attached.

In accordance with Section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the at-



tention of IT:C:P-7. The signing of this form will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the inclosed form, or on the date assessment is made, whichever is earlier; WHEREAS IF THIS FORM IS NOT FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

GUY T. HELVERING,

Commissioner.

by (Signed) W. T. SHERWOOD,

Acting Deputy Commissioner.

Inclosures:

Statement

Form 870 [15]

### STATEMENT

IT:AR:E-2

WPE-60D

In re: Mr. Richard S. McCreery,  
114 Sansome Street,  
San Francisco, California.

### INCOME TAX LIABILITY

Year—1930.

Income Tax Liability—\$12,998.44.

Income Tax Assessed—\$5,835.46.

Deficiency—\$7,162.98.

The deficiency shown herein is based upon the report dated October 26, 1932, prepared by Reve-

nue Agent F. M. Ford, and transmitted to you under date of November 17, 1932, which report is made a part of this letter.

Careful consideration has been accorded your protest dated February 28, 1933, in connection with the findings of the examining officer, and the information submitted at a conference held in the office of the internal revenue agent in charge.

A consent which will expire June 30, 1934, except as extended by the provisions of section 277 of the Revenue Act of 1928, is on file for the year 1930.

A copy of this letter, together with a copy of the statement and schedules has been mailed to your representative, John C. Altman, San Francisco, California, in accordance with the authority conferred upon him in the power of attorney executed by you and on file with the Bureau. [16]



EXHIBIT "B"

TREASURY DEPARTMENT

Internal Revenue Service

Office of

Internal Revenue Agent in Charge

Richard S. McCreery,

114 Sansome St.,

San Francisco, Calif.

San Francisco, Calif.

In re: Income Tax

Date of report: Nov. 17, 1932

Recommendation:

Years—1930.

Additional Tax—\$7,162.98.

Overassessment—

Penalties—

Total—

The recommendations which this office proposes to make with respect to your income tax liability as the result of a recent examination by an internal revenue agent are shown in the statement attached.

If you acquiesce in the proposed tax liability the inclosed Form 870 should be executed and forwarded to this office. Your consent on Form 870 to the prompt assessment of any deficiency indicated will stop the running of interest to be assessed on such deficiency under the provisions of section 283(d) of the Revenue Act of 1926 or section 292 of the Revenue Act of 1928, upon a date not later than thirty days after the filing of Form 870 properly

executed. Unless such consent is filed the interest to be assessed under the law upon any deficiency indicated runs to the date the deficiency is assessed and the assessment may be made only as provided by section 274(a) of the Revenue Act of 1926 and/or section 272(a) of the Revenue Act of 1928.

Should you desire to make immediate payment without awaiting formal assessment and notice and demand, you should communicate with the collector of internal revenue at Custom House, San Francisco, inclosing this letter, or a copy thereof. If payment is so made the interest period will terminate on the date of payment.

If you do not acquiesce in the proposed recommendations you should file a protest in writing with this office within 15 days from the date of this letter. Any protest so filed will be given careful consideration and, if you so desire, you will be given an opportunity for a hearing before the recommendations are forwarded to Washington.

Arrangements will be made by this office upon your request to answer any questions which may occur to you in your review of these recommendations.

In any event please sign the inclosed form acknowledging receipt of this letter and related papers and return such form to this office.

Respectfully,

B. W. WILDE, Jr.,

Internal Revenue Agent in Charge.

Inclosures:

Statement of adjustments.

Form 870—Form of acknowledgement. [17]

1

Name—Richard S. McCreery

STATEMENT OF TOTAL TAX LIABILITY

Year—1930

Tax previously Assessed—\$5,835.46

Adjustments Proposed in Accompanying Report:

Deficiency—\$7,162.98

Overassessment—None

Correct Tax Liability—\$12,998.44

Totals

NOTE

The amount shown in the first column of the above statement is the amount assessed on the original return except as indicated in the following summary of adjustments previously made:

Year 19

Original Tax .....	_____
Deficiency assessed ....., 19	_____
or	
Overassessment scheduled....., 19	_____
Net tax previously assessed.....	=====

Year 19 [18]

2

Preliminary Statement

Taxpayer: Richard S. McCreery

Examining Officer: F. M. Ford

Table of Contents

- Schedule 1, Block Adjustments,
  - 1-a, Explanation of Charges
  - 2, Computation of Tax
  - 3, Earned Income Credit

Principal cause of additional tax: Disallowance of loss claimed on sale of securities.

All changes were discussed with J. R. Cashman who does not agree to the adjustments.

The taxpayer contends that the sale by the sole stockholder of securities to the corporation results in a deductible loss to the stockholder.

Taxpayer, married, no dependents.

Wife, Mary C. McCreery filed separate return. Exemption \$3,500.

Related case: Mary C. McCreery, 10-17-32. [19]

## 3

Richard S. McCreery

Schedule 1

## BLOCK ADJUSTMENTS.

	Return	Additions	Deductions	Corrected
1. Salary	\$5,000.00			\$5,000.00
3. Interest	3,157.38			3,157.38
4. " on tax free Covenant Bonds	1,195.48			1,195.48
3. Losses on sales	(72684.91)			(29,310.29)
3a. Capital Net Loss				( 6,845.65)
10. Dividends	137,170.10			137,170.10
2. Total	\$ 73,838.05			\$110,367.07
3. Interest paid	205.28			205.28
4. Taxes do	3,962.24			3,962.24
7. Contributions	50.00			50.00
8. Miscellaneous	1,800.71			1,800.71
Total deductions	\$ 6,018.23			6,018.23
Net income	67,819.82			104,348.84

Schedule 1-a

EXPLANATION OF CHANGES

(1) Losses on sales per Schedule C of return		72,684.91	
Deduct loss claimed on Transamerica, S. O. of California and Caterpillar			36,529.02
Net loss allowed			
Schedule C	\$29,310.24		
Schedule D	6,845.65		36,155.89

[20]

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Richard S. McCreery  
SALES OF SECURITIES

Schedule D  
CAPITAL NET LOSS

Date	Bought Shares	Security	Cost	Sold Date	Shares	Sale Price	Loss
1927	197	Phillips Petroleum	\$9,366.34	12-31	197	\$2,495.62	\$6,870.72
		Goldman Sachs			fraction	25.07	25.07
							<u>\$6,845.65</u>

SCHEDULE C

12-6-29	940	American Radiator	31,613.00	12-31	940	13,939.90	17,691.00
12-8-29	200	American Metals	9,430.00	12-31	200	3,117.00	6,313.00
2-28-29	220	Pacific Lighting	15,920.00	12-31	220	10,835.70	5,084.30
9-30-29	23	Intercoast	402.50	11-18	23	180.66	221.84
Net Loss							<u>\$29,310.24</u>

The losses claimed on Standard Oil of California, Transamerica, and Caterpillar resulted from the transfer as of Dec. 31, 1930 of these securities from the taxpayer to the Burlingame Investment Co., a corporation of which he is the sole stockholder. The transfer was made at market value. No question is raised as to the facts involved. The certificates were deposited for transfer prior to the close of the taxable year and a credit was entered for the market price at the date. The other items listed above as December 31st sales were regular sales through brokers, whose statements show the orders executed before the close of the year.

[21]

Richard S. McCreery  
Schedule 2  
1930

## COMPUTATION OF TAX IN CASE OF A CAPITAL NET LOSS

Net income from schedule 1		\$104,348.84
Net income		104,348.84
Less capital net loss		6,845.65
		<hr/>
Income subject to surtax		\$111,194.49
Less: Dividends	137,170.10	137,170.10
		<hr/>
Balance subject to normal tax		none
Surtax on \$111,194.49	13,898.90	13,898.90
Total tax		13,898.90
Less: 12½% on capital net loss \$6,845.65	855.71	
Credit of 25% for earned net income from schedule 3	None	
Income tax paid at source 2% of \$2,237.50	44.75	900.46
		<hr/>
		12,998.44

## TAX COMPUTED UNDER SECTIONS 210 AND 211

Net income from Schedule 1		104,348.84
Income subject to surtax		104,348.84
Less: Dividends	\$137,170.10	137,170.10
		<hr/>
Surtax on \$104,384.84	12,529.77	12,529.77
		<hr/>
Total tax		\$ 12,529.77
Less: Credit of 25%	None	
Income tax paid at source	44.75	44.75
		<hr/>
Balance of tax		12,485.02
Tax assessable		12,998.44
Tax previously assessed		5,835.46
		<hr/>
Additional tax to be assessed		\$ 7,162.98

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Richard S. McCreery

SCHEDULE 3

1930

## COMPUTATION OF EARNED INCOME CREDIT

Earned net income	\$5,000.
Credit of 25%	None
Limitation:	
25% of normal tax on net income	None
25% of surtax on earned income	None
	[23]

## EXHIBIT "C"

KNOW ALL MEN BY THESE PRESENTS: That I, RICHARD S. McCREERY, with my address and office at 155 Montgomery Street, San Francisco, California, have made, constituted and appointed and by these presents do make, constitute and appoint JOHN C. ALTMAN, of San Francisco, California, my true and lawful attorney, for me and in my place and stead to execute and verify a petition to the United States Board of Tax Appeals in connection with the notice of deficiency mailed on June 29, 1933, to me by the Commissioner of Internal Revenue and to make, execute and verify any and all documents of any kind or character in connection with my said income tax liability for the calendar year 1930 as may be necessary or proper in the premises.

GIVING AND GRANTING unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as



fully to all intents and purposes as I might or could do if personally present; hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue of these presents.

IN WITNESS WHEREOF, I have hereunto subscribed my hand at Paris, France, this 7th day of August, 1933.

RICHARD S. McCREERY

[Endorsed]: Filed Aug. 12, 1933. [24]

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[Title of Court and Cause.]

ANSWER

The Commissioner of Internal Revenue by his attorney E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, for answer to the Petition filed by the above-named petitioner, admits and denies as follows:

I. Admits the allegations contained in paragraph I of the Petition.

II. Admits the notice of deficiency was mailed to the taxpayer June 29, 1933, but denies the allegations contained in the second sentence of paragraph II of the Petition.

III. Admits the allegations contained in paragraph III of the Petition except the last sentence thereof.

IV. Denies the errors alleged in sub-paragraphs (a), (b), and (c) of paragraph IV of the Petition.



V and VI. Denies the allegations of fact contained in Paragraphs V and VI of the Petition.

Denies generally and specifically each and every allegation of fact not hereinbefore admitted, qualified, or denied.

(Signed) E. BARRETT PRETTYMAN

General Counsel,

Bureau of Internal Revenue.

Of Counsel:

THOMAS F. CALLAHAN,

Special Attorney,

Bureau of Internal Revenue.

tls 9-21-33.

[Endorsed]: Filed Sep. 22, 1933. [25]

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[Title of Court and Cause.]

JOHN C. ALTMAN, Esq., for the petitioner.

GEORGE D. BRABSON, Esq., for the respondent.

#### MEMORANDUM OPINION

MORRIS: The respondent having determined a deficiency in income tax of \$7,162.98 for the taxable year 1930, petitioner brings this proceeding for the redetermination thereof, alleging error in the disallowance of losses sustained upon sale of the following: [26]

	Loss Alleged
957 shares Standard Oil Company of California	\$12,783.47
661 shares Transamerica Corporation	22,263.40
160 shares Caterpillar Tractor Company	2,455.00

It is alleged that of said \$12,783.47 and \$22,263.40, \$7,914.47 and \$18,638, respectively, represent capital losses within the purview of section 101 of the Revenue Act of 1928, and that the balances of said amounts represent ordinary losses.

The petitioner, an individual, whose place of business is in San Francisco, and who designates himself, for income tax purposes, a "capitalist," is the president and sole stockholder—except for two qualifying shares, one held by the petitioner's wife and the other, at first by his son Lawrence McCreery, then J. R. Cashman, and finally by John C. Altman—of Burlingame Investment Company, a California corporation, which he caused to be organized and incorporated under the laws of that State in 1924, and to which he transferred 18 stocks and 7 blocks of bonds, receiving in exchange therefor, 4,000 shares of the capital stock of the company, par value \$100 per share. The company is engaged in buying and selling securities. At one time it owned a substantial tract of realty.

On and prior to December 30, 1930 petitioner was the owner of 957 shares of the capital stock of Standard Oil Company of California, 661 shares of Transamerica Corporation, and 160 shares of Cater-

pillar Tractor Company. 753 of the said Standard Oil Company shares, owned by the petitioner continuously for over two years, had a cost basis to him, for income tax purposes, of \$41,046.47, and the remainder, 204 shares, owned less than [27] two years, had a cost basis, for such purposes, of \$13,845. 536 shares of the Transamerica Corporation stock, owned by the petitioner continuously for more than two years, have a cost basis to him, for income tax purposes, of \$25,070 and 125 shares thereof, owned by him for a period less than two years, have a cost basis of \$5,120.05. The 160 shares of Caterpillar Tractor Company were owned by the petitioner less than two years, and they have a cost basis to him, for tax purposes, of \$6,615.

On December 30, 1930 the petitioner unqualifiedly sold his said shares of stock of Standard Oil Company, Transamerica Corporation and Caterpillar Tractor Company to Burlingame Investment Company at the closing market quotations shown upon the San Francisco Stock Exchange on that date. Those quotations were as follows:

Standard Oil Company of California	\$44.00	per share
Transamerica Corporation	12.00	" "
Caterpillar Tractor Company	25.75	" "

Immediately upon the sale of the foregoing shares he endorsed the certificates therefor in the name of Burlington Investment Company and delivered them either on December 30 or 31, 1930 to the respective transfer agents for the three corporations with in-

structions to have new certificates issued in the name of Burlingame Investment Company and in due course, that is, within a few days thereafter, the company received the certificates for the stocks which it had purchased, all dated December 31, 1930. Separate individual books of account were kept by the petitioner from those of the company. Appropriate book entries were made upon the petitioner's [28] individual books of account and upon the books of the company, as of December 31, 1930, showing the sale and the charge therefor, on the one hand, and purchase and liability for payment of the purchase price, on the other, in the following amounts:

957 shares Standard Oil Company of California	\$42,108.00
661 shares Transamerica Corporation	7,932.00
160 shares Caterpillar Tractor Company	4,160.00

The petitioner's personal account upon the books of Burlingame Investment Company, in which all transactions between him and the company were recorded, showed a debit balance against him of \$38,000 before the credits of \$42,108, \$7,932 and \$4,160, the purchase price of the three stocks hereinbefore discussed, were credited thereto. After his account received the credits for those amounts on December 31, 1930 and after his said account on that same date had been credited with a dividend of \$40,000, it showed a credit balance of \$56,200, which balance was carried forward in the account to Jan-

uary 1, 1931. No actual payment by the company was made to the petitioner for the purchase price of said stocks. It was at all times possessed of marketable securities, however, several times greater than the amount which it owed.

The foregoing were the only sales transacted between the petitioner and the company during 1930—these were made with income tax deductions in mind. The petitioner did, however, sell securities to others during 1930 upon which he sustained and claimed losses in that year. [29]

In his individual income tax return for the calendar year 1930 the petitioner claimed losses of \$12,783.47, \$21,290.55, and \$2,455, upon the sale of his said shares of Standard Oil Company of California, Transamerica Corporation, and Caterpillar Tractor Company, respectively, which, together with other claimed losses, aggregated \$72,684.91.

In commenting upon his disallowance of the said losses claimed by the petitioner the respondent says the following in his deficiency notice:

The losses claimed on Standard Oil of California, Transamerica, and Caterpillar resulted from the transfer as of Dec. 31, 1930 of these securities from the taxpayer to the Burlingame Investment Co., a corporation of which he is the sole stockholder. The transfer was made at market value. No question is raised as to the facts involved. The certificates were deposited for transfer prior to the close of the taxable year and a credit was entered for the market

price at the date. The other items listed above as December 31st sales were regular sales through brokers, whose statements show the orders executed before the close of the year.

The respondent contends that the alleged sale of the petitioner's securities to Burlingame Investment Company on December 31, 1930, was a "colorable" transaction, therefore, invalid, and that even if held to be valid, it was ineffectual to remove the securities from the dominion and control of the petitioner, consequently, no deductible loss could result. His argument is directed at the dual relationship of sole owner and dominant head of the corporation, on the one hand, dealing with himself in his individual and private capacity, on the other. He points to many cases denouncing this practice under an old and familiar rule. But that [30] rule was designed as a protective measure where the rights of other stockholders or creditors were involved, a situation not present in the instant case.

The respondent seemingly recognizes that Edward Securities Corporation, 30 B. T. A. 918, will be held controlling, though a rather feeble effort to distinguish the two cases was made. In that case one D'Ancona—who owned 9,980 of 9,982 outstanding shares of the capital stock of that petitioner, the two remaining shares being in the hands of others for qualifying purposes—sold certain shares of capital stock to that petitioner in 1929. In the following year, 1930, that petitioner sold the same



shares back to D'Ancona, at market value, and it claimed the loss sustained in that year. The same argument advanced by the respondent here was made there. We held that the corporate entity could not be disregarded, citing *Burnet v. Commonwealth Improvement Co.*, 287 U. S. 415; that the sale of stock by the petitioner to its stockholder, at market—notwithstanding he owned all but two of its shares and was in complete control thereof and all of its activities—was bona fide and that the loss claimed was deductible. The two cases are practically indistinguishable. On the authority of that case we have no other alternative than to sustain the petitioner's contention. See also *A. S. Eldridge*, 30 B. T. A. 1322.

Decision will be entered under Rule 50.

Entered Jun. 19, 1935. [31]

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United States Board of Tax Appeals

Docket No. 73322.

RICHARD S. McCREERY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

The parties to the above-entitled proceeding having filed recomputations in accordance with Rule 50

pursuant to memorandum opinion entered herein June 19, 1935, respondent's recomputation showing a deficiency of \$1,655.11 and petitioner's recomputation showing a deficiency of \$1,655.12 for the year 1930, it is

ORDERED and DECIDED: That there is a deficiency for the year 1930 of \$1,655.11.

[Seal] (Signed) LOGAN MORRIS,  
Member.

Entered Jul 27 1935. [32]

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[Title of Court and Cause.]

PETITION FOR REVIEW AND ASSIGN-  
MENTS OF ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

NOW COMES Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue and George D. Brabson, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

Your petitioner on review, hereinafter referred to as the Commissioner, is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States. Your respondent on review, hereinafter referred to as the taxpayer, is an in-



dividual and an inhabitant of the City of San Francisco, State of California, and filed his income tax return for the year in question with the Collector of Internal Revenue for the First District of California whose office is located in the City of San Francisco, California, and within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit. [33]

## II.

The Commissioner determined a deficiency of Federal income taxes against the taxpayer for the calendar year 1930 in the amount of \$7,162.98, and on June 29, 1933, in accordance with the provisions of Section 272, Revenue Act of 1928, sent to the taxpayer by registered mail a notice of said deficiency. Thereafter, on August 12, 1933, the taxpayer filed an appeal from said notice of deficiency with the United States Board of Tax Appeals, being Docket No. 73322.

On June 19, 1935, the Board of Tax Appeals promulgated its memorandum opinion, and on July 27, 1935, entered its final order and decision in said appeal wherein and whereby the Board of Tax Appeals ordered and decided that the deficiency determined by the Commissioner was erroneous and that the correct deficiency against the taxpayer for said year was \$1,655.11. The opinion of the Board of Tax Appeals is not reported.

## III.

The nature of the controversy is as follows:

The taxpayer is an individual residing at San Francisco, California. His business is that of a capitalist and investor in stocks and bonds and real estate. During the year 1930 taxpayer was the owner of 661 shares of Transamerica Corporation, 160 shares of Caterpillar Tractor Company and 957 shares of Standard Oil of California. On December 30, 1930, taxpayer for the purpose of claiming income tax deductions transferred all of said stocks to the Burlingame Investment Company.

The Burlingame Investment Company was a one man corporation organized by the taxpayer in 1924 to hold certain stocks and securities [34] owned by the taxpayer, in order to "avoid paying an inheritance tax on what I call the Eastern securities" in case of taxpayer's death. The corporation had no other business.

All of the stock of the Burlingame Investment Company was owned by taxpayer and all of it was issued to him except two qualifying shares which were issued to his wife and son. The corporation has only three stockholders and directors, the taxpayer, his wife and his son.

The taxpayer has always been president of the corporation; he was sole manager and directed all the affairs of the corporation and "nobody else had anything to do with it." All of the policies and

dealings of the corporation were determined by taxpayer alone and "nobody else had anything to say about that." No one else was ever consulted in regard to the policies of the corporation, except a broker whom the taxpayer consulted from time to time as to the value of certain stocks. But there was no one anywhere who could direct or control the taxpayer in any respect as to the business or policies of the corporation.

The corporation had a bookkeeper who kept not only its books but also the personal books of the taxpayer and the books of the McCreery Estate Company. All three sets of books were kept in the same office under the taxpayer's personal direction and were constantly at his disposal. Taxpayer himself directed how all entries were to be made in each set of books. Since 1924 taxpayer has carried an open account with the Burlingame Investment Company through which taxpayer withdrew funds at will and without consulting anyone. Taxpayer alone determined what investments the corporation should make and how much money the corporation should advance to him. Taxpayer was largely indebted to [35] the corporation from time to time but paid no interest on his indebtedness, nor did the corporation pay him interest "because it was unnecessary."

The transfer of stocks in question on December 30, 1930, was decided upon by taxpayer alone, acting both for himself and for the corporation. There was no corporate resolution and no corporate

action whatever authorizing the purchase of these stocks by the corporation. In fact the corporation at no time authorized the taxpayer to purchase stocks for it except the original purchase in 1924. This alleged sale of December 30, 1930, was the only transaction where taxpayer transferred any stocks to the corporation directly.

Taxpayer was the only officer of the corporation authorized to draw checks on the corporate account. No cash or checks whatever passed from the corporation to the taxpayer in connection with the so-called sale of December 30, 1930. All that taxpayer did was to transfer his stocks to the name of the corporation and all the corporation did was to credit taxpayer's open account on the books with the "purchase price". This was contrary to the corporation's usual practice in crediting taxpayer's open account, the usual practice being to credit his account at the bank.

The books of the corporation were not accurately kept and certain mistakes had occurred in connection with the purchase of stocks, indicating numerous retransfers of stocks from the name of the taxpayer to that of the corporation and vice versa covering the years 1928 to 1930. [36]

In the proceeding before the Board the taxpayer contended that the transfer was a bona fide sale because the corporation was a separate entity which rendered a separate return and paid income taxes thereon and that the corporation entity could not be disregarded.

Respondent contended that the transfer of December 30, 1930, was a sham, an unreal, invalid transaction; that none of the requirements of the law as to sales had been met, that not a single corporation action or resolution which the law requires to constitute a valid corporation transaction, was performed; that the transfer was made solely for the purpose of claiming income tax losses and must therefore comply with the strictest letter of the law.

The Board ignored the facts in the case and held that the sale was bona fide, entirely upon the ground that the corporate entity could not be disregarded.

### III.

The Commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination entered by the Board manifest error occurred and intervened to the prejudice of the Commissioner and the Commissioner hereby assigns the following errors which he avers occurred in said record, proceedings, decision and final order of redetermination so entered by the Board, to wit:

1. The Board erred in failing to find as a fact that the Burlingame Investment Company was organized by petitioner to hold certain stocks and securities owned by him in order to "avoid paying an inheritance tax on what I call the Eastern securities", in case of petitioner's death, and that the sales here in question were made for *for* the sole purpose of claiming income tax deductions. [37]



2. The Board erred in failing to find as a fact that the petitioner was president of the corporation and its sole manager, and that he directed all of its affairs and "nobody else had anything to do with it."

3. The Board erred in failing to find as a fact that all of the policies of the corporation including its purchases and sales of stocks were determined by the petitioner alone without consulting other officials or directors of the corporation, and "nobody else had anything to say about that."

4. The Board erred in failing to find as a fact that no one else was ever consulted in regard to the business or policies of the corporation, except that petitioner did consult his broker at times as to certain stock transactions, and that there was no one who could direct petitioner in any respect as to the business or the policies of the corporation.

5. The Board erred in failing to find as a fact that the stocks in question were transferred by petitioner to the Burlingame Investment Company on December 30, 1930; that petitioner alone decided upon that sale by himself as an individual and decided upon the purchase by the corporation; that there was no corporate resolution and corporate action of any sort authorizing or ratifying the purchase of these stocks by the corporation; and that this alleged sale of December 30, 1930 was the only transaction where petitioner sold any stocks to the corporation directly.

6. The Board erred in failing to find as a fact that the Burlingame Investment Company at no

time authorized petitioner to purchase stocks for it except the original transfer of property in return for its capital stock upon organization in 1924. [38]

7. The Board erred in failing to find as a fact that petitioner was the only officer of the Burlingame Investment Company authorized to draw checks on the corporation's account; that no cash passed between the parties and no consideration was given for the transfer of stocks except the book entry, and all that the corporation did was to credit Petitioner's open account with the purchase price. That this was contrary to the corporation's usual practice in crediting petitioner's open account, the usual practice being to credit petitioner's account under such circumstances at the bank.

8. The Board erred in failing to find as a fact that the same bookkeeper kept the books of the corporation and the books of petitioner, as well as the books of the McCreery Estate Company; that all three sets of books were kept in the same office and under petitioner's personal direction and were at his disposal constantly; and that petitioner himself directed how the entries in question were to be made and what entries were to be made in each set of books.

9. The Board erred in failing to find as a fact that from its organization in 1924 petitioner carried an open account on the books of the Burlingame Investment Company through which petitioner withdrew funds at will from the corporation without



interference from anyone; that petitioner alone decided what loans or investments the corporation should make and how much it should loan to him; and that petitioner was indebted to the corporation frequently on account of such withdrawals but that he paid no interest thereon and neither did the corporation pay him interest "because he thought it was unnecessary." [39]

10. The Board erred in failing to find as a fact that the books of the Burlingame Investment Company were not accurately kept and that certain mistakes occurred in connection with the purchase of stocks, the books showing numerous stocks transferred from the name of petitioner to the name of the corporation and vice versa during the years 1928 through 1930, without showing any consideration for such transfers.

11. The Board erred in holding that the transfer of the stocks in question by petitioner to the corporation under the facts of record constituted a bona fide sale of the stocks.

12. The Board erred in holding that the usual requirements of corporate authority or ratification in transactions between the corporation and one of its officers were not necessary in this case.

13. The Board erred in holding that this case was governed by the case of *Edwards Securities Corporation*, 30 B. T. A. 918, in which an appeal is now pending.

14. The Board erred in holding that the corporate entity here should not be disregarded although the corporation was in fact the alter ego of petitioner.

15. The Board erred in failing to hold for respondent upon the facts of record.

WHEREFORE, the Commissioner petitions that the decision and final order of the Board of Tax Appeals be reviewed by the United States [40] Circuit Court of Appeals for the Ninth Circuit, that a transcript of the record be transmitted to the Clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by the said Court.

(Signed) FRANK J. WIDEMAN,  
Assistant Attorney General.

(Signed) ROBERT H. JACKSON,  
Assistant General Counsel for the  
Bureau of Internal Revenue.

(Sgd.) GEO. D. BRABSON,  
Special Attorney,  
Bureau of Internal Revenue.

GDB:MFH

9/18/35 [41]

United States of America  
District of Columbia—ss.

GEORGE D. BRABSON, being duly sworn, says that he is a Special Attorney in the Office of the Assistant General Counsel, Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof;

that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

(Sgd) GEORGE D. BRABSON.

Sworn and subscribd to before me this 20 day of September, 1935.

My commission expires Nov. 16, 1937.

(Sgd) GEORGE W. KILIS,  
Notary Public.

[Endorsed]: Filed Sep. 23, 1935. [42]

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[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR  
REVIEW.

To:

Richard S. McCreery,  
155 Montgomery Street,  
San Francisco, California.

John C. Altman,  
615 Russ Building,  
San Francisco, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 23rd day of September, 1935, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the deci-

sion of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 23rd day of September, 1935.

(Signed) ROBERT H. JACKSON,  
Assistant General Counsel for  
the Bureau of Internal  
Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 30th day of Sept., 1935.

.....  
Respondent on Review.  
(Sgd) JOHN C. ALTMAN  
Attorney for Respondent on  
Review.

[Endorsed]: Filed Oct. 10, 1935. [43]

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[Title of Court and Cause.]

STIPULATION OF FACTS.

IT IS HEREBY STIPULATED by and between the parties hereto by their respective attorneys that, for the purposes of this proceeding, the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and

further evidence, not inconsistent with the facts herein stipulated to be taken as true:

1. On December 30, 1930, petitioner was the owner of the following shares of stock, which had a cost basis to petitioner, for income tax purposes, in the amounts respectively set opposite the same, and which had been continuously owned and held by petitioner for the periods hereinafter set forth:

(a) 753 shares of the capital stock of Standard Oil Company of California, held and owned continuously for over two years and having a cost basis to petitioner of \$41,046.47. [44]

(b) 204 shares of the capital stock of Standard Oil Company of California, having been held and owned for less than two years and having a cost basis to petitioner of \$13,845.00.

(c) 536 shares of the Capital Stock of Trans-america Corporation, held and owned continuously for more than two years and having a cost basis to petitioner of \$25,070.00.

(d) 125 shares of the capital stock of Trans-america Corporation, having been held and owned for less than two years, and having a cost basis to petitioner of \$5,120.05.

(e) 160 shares of the capital stock of Caterpillar Tractor Company, having been held and owned for less than two years, and having a cost basis to petitioner of \$6,615.00.

2. On December 30, 1930, the fair market value per share of the stock of each of the three corporations hereinabove referred to, as evidenced by

the listed sale price on said date on the San Francisco Stock Exchange was as follows:

Standard Oil Company of

California,	\$44.00 per share
Transamerica Corporation,	12.00 per share
Caterpillar Tractor Company,	25.75 per share

JOHN C. ALTMAN

615 Russ Building

San Francisco, Calif.

Counsel for Petitioner.

ROBERT H. JACKSON

General Counsel

Bureau of Internal Revenue

Counsel for Respondent.

[Endorsed]: Filed at Hearing Jul. 13, 1934. [45]

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[Title of Court and Cause.]

STATEMENT OF EVIDENCE.

This cause came on for hearing before the Honorable Logan Morris, Member of the United States Board of Tax Appeals on July 13, 1934, at San Francisco, California. John C. Altman, Esq., appeared for the taxpayer and Robert E. Jackson, Esq., Assistant General Counsel for the Bureau of Internal Revenue and George D. Brabson, Esq., Special Attorney, Bureau of Internal Revenue, appeared for the Commissioner.



Whereupon the taxpayer to maintain the material averments of the petition offered in evidence a stipulation of certain facts in the case signed by counsel for both parties and in words and figures as follows:

IT IS HEREBY STIPULATED by and between the parties hereto by their respective attorneys that, for the purposes of this proceeding, the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence, not inconsistent with the facts herein stipulated to be taken as true:

1. On December 30, 1930, petitioner was the owner of the following shares of stock, which had a cost basis to petitioner, for income tax purposes, in the amounts respectively set opposite the same, [46] and which had been continuously owned and held by petitioner for the periods hereinafter set forth:

(a) 753 shares of the capital stock of Standard Oil Company of California, held and owned continuously for over two years and having a cost basis to petitioner of \$41,046.47.

(b) 204 shares of the capital stock of Standard Oil Company of California, having been held and owned for less than two years and having a cost basis to petitioner of \$13,845.00.

(c) 536 shares of the Capital Stock of Trans-america Corporation, held and owned continuously



for more than two years and having a cost basis to petitioner of \$25,070.00.

(d) 125 shares of the capital stock of Transamerica Corporation, having been held and owned for less than two years, and having a cost basis to petitioner of \$5,120.05.

(e) 160 shares of the capital stock of Caterpillar Tractor Company, having been held and owned for less than two years, and having a cost basis to petitioner of \$6,615.00.

2. On December 30, 1930, the fair market value per share of the stock of each of the three corporations herein above referred to, as evidenced by the listed sale price on said date on the San Francisco Stock Exchange was as follows:

Standard Oil Company of California, \$44.00 per share.

Transamerica Corporation, \$12.00 per share.

Caterpillar Tractor Company, \$25.75 per share.

[47]

In further support of the averments of the petition, the taxpayer introduced the following oral testimony:

RICHARD S. McCREERY,

the taxpayer, being duly sworn was examined and testified as follows:

Direct Examination

My name is Richard S. McCreery and I am the petitioner herein. I was the owner on December 30, 1930 of 957 shares of Standard Oil of Califor-

(Testimony of Richard S. McCreery.)

nia, 661 shares of Transamerica Corporation, and 160 shares of Caterpillar Tractor Company. On that date I sold all of them to Burlingame Investment Company. This was a California corporation organized in 1924 and continuously in existence since then. Since its organization in 1924, I have owned its entire issued and outstanding capital stock. It was engaged at all times in owning, buying and selling securities, and at one time owned one substantial piece of real estate. I have been president of the Burlingame Investment Company since its organization and the sole person in charge of its active affairs.

These various shares of stock aforesaid were sold to the Burlingame Investment Company at the closing market price of the San Francisco Stock Exchange on December 30, 1930. Each of those stocks were dealt in and listed on the San Francisco Stock Exchange. I ascertained the closing price on that day and that was the price at which I sold them. On that day the certificates representing all of these shares of stock stood in my name individually and were in my possession. Immediately after the sale I endorsed the certificates over to the Burlingame Investment Company. It took two or three days to make the transfers. All of [48] these endorsed certificates were actually delivered over on December 30th or 31st, 1930 to the respective transfer agents of the three issuing companies with instructions to have new certificates issued in the name of the Burlin-

(Testimony of Richard S. McCreery.)

game Investment Company. Within a few days thereafter the Burlingame Investment Company received certificates of stock representing all the shares aforesaid issued in its own name.

My counsel shows me ten certificates of stock of Standard Oil Company of California, one for fifty-seven shares and nine for one hundred shares each, each certificate issued in the name of Burlingame Investment Company, and each certificate issued is dated December 31, 1930. Each of these certificates is unendorsed and has been continuously in the possession of Burlingame Investment Company since a few days after December 31, 1930.

The same is true of two certificates of Caterpillar Tractor Company, one for sixty shares and one for one hundred shares each endorsed and issued in the name of Burlingame Investment Company, each dated December 31, 1930, and each continuously in the possession of Burlingame Investment Company since that time.

The certificates representing the shares of stock of Transamerica Corporation which were sold to the Burlingame Investment Company on December 30, 1930, were sold by it in 1932. The Burlingame Investment Company received certificates issued in its name for 661 shares Transamerica Corporation about the same time it received the certificates of Standard Oil Company and Caterpillar Tractor Company, all these certificates being similarly dated December 31, 1930. The Burlingame Investment

(Testimony of Richard S. McCreery.)

Company continuously owned and held the Trans-america shares [49] from that time until the date of their sale by it in 1932. These 661 shares of Trans-america were sold in the open market by Burlingame Investment Company through a broker. I did not purchase them nor do I know who the purchaser was. The Burlingame Investment Company received the net proceeds of the sale of the 661 shares aforesaid and retained them solely for itself. I received no part thereof.

From the time the Burlingame Investment Company acquired these shares of stock of Standard Oil Company and Caterpillar it received all dividends paid on those stocks down to the present time and it has retained all those dividends for its own purposes. It received all dividends paid on the Transamerica stock from the time of acquisition in December, 1930 to the time of sale in 1932. There was no agreement between me and the Burlingame Investment Company at any time either written or oral whereby I had the right to repurchase any of these shares of stock I sold to the Burlingame Investment Company, or that I would receive any of them back or any interest therein.

The Burlingame Investment Company since its organization in 1924 has kept separate books of account consisting of a ledger and cash book and a journal. I did not personally write up the accounts in the books but I supervised them. The Burlingame Investment Company had a bookkeeper

(Testimony of Richard S. McCreery.)

and I supervised all entries, and they were all original entries made at the respective times any transaction was reported. In these books of account there was recorded all items of income, dividends, interest, sales, purchases, etc., and all financial transactions and every item. [50]

I have kept separate books of account for my own affairs consisting of a ledger, journal and cash book. These books were also kept under my supervision by a bookkeeper and in those books there has been entered regularly at the time any transaction occurred or any item of income was received or any item paid out, the particular item. I have here my original individual ledger. At the request of my counsel I turn to account No. 98 in that ledger entitled Standard Oil of California. It reads as follows: December 31, 1930, 957 shares, and the amount is \$42,108.00. That represents the sale by me of my 957 shares of Standard Oil of California to the Burlingame Investment Company which I have just testified to. That entry was made on that date.

I turn to ledger account No. 31-A, which is headed Transamerica Corporation, and under it December 31, 1930, 661 shares, \$7,932.00. That entry represents the sale by me of those shares I have just testified to.

I turn to ledger account No. 100-A entitled Caterpillar Tractor Company stock and I find the entry as follows: December 31, 1930, 60 shares, \$4,160.00.



(Testimony of Richard S. McCreery.)

That represents the sale of those particular shares to Burlingame Investment Company.

I turn to account No. 7 entitled Burlingame Investment Company. That is an account between me and the Burlingame Investment Company and it records charges and credits between the two of us. I find the following entries in that account:

December 31, Standard Oil of California,	\$42,108.00
December 31, Transamerica	7,932.00
December 31, Caterpillar	4,160.00.
	[51]

These entries record the moneys charged to the account of the Burlingame Investment Company on my books.

Under the same account there is the succeeding entry of the same date to wit, December 31, 1930, dividend No. 6, \$40,000.00. That represents a dividend that was declared on that date by the Burlingame Investment Company of which I was sole stockholder at that time. Payment thereof was made by my charging the account of Burlingame Investment Company. Similarly, when I received money for the Burlingame Investment Company I credited that particular account. Immediately prior to the sale the books show that the net account between me and the Burlingame Investment Company recorded that I owed the company \$38,000.00. These charges to the Burlingame Investment Company were offset against that and left a credit balance in my favor of some \$16,000.00.

(Testimony of Richard S. McCreery.)

I identify this book my counsel hands me as the original ledger of the Burlingame Investment Company. In it I find on page 127 an account entitled Standard Oil Company of California stock, and under that account an entry reading as follows: December 31, 1930, 957 shares, \$42,108.00. That was to record the purchase by the Burlingame Investment Company of those shares of stock from me. Similarly on page 127 there is an account entitled Transamerica Corporation stock and under it an entry reading: December 31, 1930, 661 shares, \$7,932.00. That is to record the purchase by the Burlingame Investment Company from me of those shares.

On page 132 of the Burlingame Investment Company's original ledger I find an account entitled Caterpillar Tractor Company and under it an entry reading: December 31, 1930, purchase of 160 shares, \$4,160.00. That is to record the purchase by the Burlingame Investment Company of those shares from me. [52]

I now turn to page 2 of the Burlingame Investment Company ledger to an account entitled Richard S. McCreery. That is the account of the Burlingame Investment Company with me, and that corresponds with the similar entries I have just showed in this ledger of my account with it. I find in this account the following entries:



(Testimony of Richard S. McCreery.)

December 31, 1930, 957 shares Standard Oil of California,	\$42,108.00
December 31, 1930, 661 shares Transamerica	7,932.00
December 31, 1930, 160 shares Caterpillar	4,160.00

Those entries record the credit to my account on my books showing money due from the Burlingame Investment Company.

Immediately following those entries I find another one dated December 31, 1930, dividend No. 6, \$40,000.00. That is the same dividend I referred to above in my testimony about the Burlingame Investment Company books, and it shows that I am crediting myself with the amount of that dividend.

Mr. BRABSON: While we have that ledger, can't we turn to the cash account and see if any checks were issued on or about the same time, in payment of this stock?

Mr. ALTMAN: There were no checks issued.

Mr. BRABSON: No checks issued. That is admitted as a fact?

Mr. ALTMAN: At this time there were no checks issued. The debits and credits——

Mr. BRABSON: Were all that took place.

Mr. ALTMAN: ——were all that took place.

This entry my counsel has just asked about in the Burlingame Investment Company ledger of a \$40,000.00 dividend is the same dividend that I referred to a moment ago in respect of my own ledger. [53]

(Testimony of Richard S. McCreery.)

Q. In connection with the declaration and payment by the Burlingame Investment Company to you of dividends during all of these years did you receive actual cash for those dividends at the particular moment?

A. No.

Q. The manner of payment was to credit your account with them?

A. At the bank.

Q. And on your books charged them with them?

A. Yes.

The Burlingame Investment Company at no time in its history has owed any moneys to anybody but me. At all times when it owed any money to me it has had marketable securities salable on a recognized stock exchange of at least three, four or five or six times the value it ever owed me. At some times I was indebted on a net basis to the Burlingame Investment Company. On the question of these purchases and sales of stock between me and the Burlingame Investment Company it was the custom in vogue from the beginning that any gain one way or the other would be recorded by respective credits or debits on each book. And from time to time these accounts between us were paid down so that they were even or one owed instead of the other. Every day the books of both the Burlingame Investment Company and myself showed the exact status of that account between us.

(Testimony of Richard S. McCreery.)

I testified a few moments ago that at the time the sale was made by me of all these shares aforesaid I was at that time indebted to the Burlingame Investment Company in the sum of \$38,000.00. The sale price paid by the Burlingame Investment Company was credited against that and the balance credited to my account. [54]

#### Cross-Examination

My business from 1924 to 1930 personally was simply stocks and bonds and one piece of real estate. I reported myself in my income tax return as a capitalist. By this I meant that I was investing in stocks and bonds and real estate. This was the same business as the Burlingame Investment Company more or less, except personally I was interested in a cattle ranch.

I organized the Burlingame Investment Company, and all the stock was owned by me except one share which was owned by my wife. I have testified on direct examination that I managed the affairs of the corporation entirely and "nobody else had anything to do with it." There were no other directors except myself, my wife and the secretary of the corporation. His name when we first formed the corporation was Cashman. He did not own any stock in it, but we had to appoint somebody—we had to have a man to supervise the thing.

Q. You do not mean he was a director then. You mean he was a straw man. He was a book-keeper, is that the idea?

A. Yes.

(Testimony of Richard S. McCreery.)

Mr. ALTMAN: Mr. Brabson, if I may interrupt. There have always been two shares issued for qualification purposes, one for his wife as a director and one for the third director. As a matter of fact, Mr. Lawrence McCreery, his son, since deceased, was the third director and secretary, and when he died, J. R. Cashman became the third director and secretary; and when Cashman left, since about two years ago I have been the third director and secretary, with purely a qualifying share to entitle the director to act. As a matter of fact, I think Mr. McCreery [55] is the beneficial owner of the one share.

Mr. BRABSON: You will stipulate that?

The MEMBER: Is that statement just made stipulated?

Mr. ALTMAN: Yes.

The MEMBER: The record will so show.

Since I was the owner of all the stock and directed all the affairs of the company as I have just testified, I therefore directed the policies of the company and nobody else had anything to say about that.

The stock of the Burlingame Investment Company originally issued to me was issued in exchange for all of the California stocks. By that I mean stocks of corporations organized under the laws of California. I have here the original minute book, and in accordance with the books a block of some

(Testimony of Richard S. McCreery.)

eighteen stocks and seven blocks of bonds were turned over to the Burlingame Investment Company by me.

Mr. ALTMAN: We will stipulate that there were 4,000 issued to Mr. McCreery in exchange for the securities, but that two lots of one share each were issued to his wife and son to qualify. Each share had a par value of \$100.00.

I arrived at the value of the stocks—that is a long time ago now, ten years ago, but I think it was taken at what they were supposed to be worth at that time; that is what they were worth on the market at all times. I think every share was on the market. I never bought things that were not on the market.

The bookkeeper in my office kept the books of the Burlingame Investment Company. In 1930 the name of the bookkeeper was Mrs. Aggeler. She also kept my personal books. Both sets of books were kept in my office. I had the same office as the Burlingame Investment Company. [56] The McCreery Estate Company also had the same office, that is all three had the same office in the same place. I did not keep the books; I supervised all of them.

Q. In other words, you directed what entries were to be made in the books of all three?

A. Well, whenever any sale or purchase was made, the checks came in and were given to the bookkeeper.

(Testimony of Richard S. McCreery.)

Every sale or purchase of stocks and bonds, the brokers sent in the statements and they were entered by the bookkeeper. When I made sales of stocks to the company I told them—I said they were to be entered to my account or to the Burlingame Investment Company or to the McCreery Estate Account. In other words, I directed how the entries were to be made more or less.

To my recollection my wife filed a separate return for 1930. Asked why, I would say that she always did. I am not going to swear to anything that I am not positive of. To my recollection I think she did but I am not going to swear to it because I might be wrong.

The Burlingame Investment Company was a company formed with the object that in case of my death—I am still alive and this was ten years ago—we would avoid paying an inheritance tax on what I call the eastern securities, foreign securities, because we bought them here in California. It had no other business at all. I did not transfer securities to the Burlingame Investment Company from time to time over a period of years. I bought securities sometimes through the Burlingame Investment Company but I never transferred them. They were bought outright on the market. In other words, so far as I know and I think I am right, these transactions in question are the only cases in which I sold stocks to the Burlingame Investment Company direct. [57]



(Testimony of Richard S. McCreery.)

I carried an open account with the Burlingame Investment Company from its very beginning and I still do. I have stated before that I was indebted to the corporation on that account sometimes. I paid no interest on my indebtedness to the corporation and they paid no interest to me, because it was unnecessary.

Asked whether there was anyone anywhere who could direct me in any respect in regard to what should be done as to the business of the Burlingame Investment Company, my answer is that I might have taken some advice about stocks and bonds from somebody who I thought knew more about it than I did but otherwise I directed the whole thing. I did consult brokers at some times, yes.

Q. Did you draw the checks of the company?

A. Which company?

Q. The Burlingame Investment Company.

A. If I drew any money out?

Q. No.

A. They had a separate account.

Q. Who issued the checks for the Burlingame Investment Company when it went to pay for anything?

A. I did, on a separate bank account.

Q. You withdrew funds from the company on this open account between you and the company whenever you desired, didn't you?

A. Whenever the financial condition or situation



(Testimony of Richard S. McCreery.)

warranted it, yes.

There was no one to prevent me doing that as long as the thing was in order. I directed the policy of the company. I ultimately was the one who decided what investments the Burlingame Investment Company should make but I used to consult sometimes two or three people, friends of mine who were stock brokers or in the banking business. As I have just told you I used to get advice from outsiders. But they had no interest in the company. There was no one who could say no if I wanted to buy a stock for the company. [58] I also decided what loans, if any, the Burlingame Investment Company should make. I also decided how much money the Burlingame Investment Company should lend to me. There was no one else who could decide that.

I was the one who decided on the three sales made December 30, 1930 in question here.

Q. That is what I say, who else could. Was there any corporate authorization or resolution of the corporation authorizing this purchase?

A. Yes. I consulted my wife always.

Q. And that was the resolution, was it?

A. Yes.

Q. O. K. That is all the resolution there was?

A. And when my son was alive, I consulted him.

Q. I ask you again, was there any formal resolution of the corporation authorizing the Burlingame Investment Company to buy this stock?

A. There was.

(Testimony of Richard S. McCreery.)

Q. Let us see it.

Mr. ALTMAN: There was no resolution.

Mr. BRABSON: You admit there was no resolution?

Mr. ALTMAN: As a matter of fact there was no corporate resolution authorizing the purchase of any security, from the inception down to date. As secretary, I can so state.

Mr. BRABSON: All right. I am glad to have that.

The MEMBER: Is that stipulated in the record?

Mr. ALTMAN: That is stipulated.

The MEMBER: The record will so show.

Mr. ALTMAN: The record may show there was authorization from the beginning authorizing Mr. McCreery to sell any shares of stock of the corporation. [59]

No one had authority to sign checks of the corporation except me. I have none of the checks here at the hearing but at the office there are loads of them. No checks were actually issued in payment for the stocks which I transferred to the Burlingame Investment Company on December 30, 1930. No checks were ever issued in payment for those stocks; they were transferred.

It was stipulated by the parties at this point that the account between the taxpayer and the Burlingame Investment Company was balanced on May 22, 1930.

On October 30, 1930, the records show that I was

(Testimony of Richard S. McCreery.)

indebted to the Burlingame Investment Company in the sum of \$58,000.00 even.

At this point it was stipulated that the taxpayer was actually indebted to the corporation in the amount of \$58,000.00 on October 30, 1930.

I have testified that no interest was ever paid on the balances which I owed to the corporation. No one ever asked me to repay this \$58,000.00. I repaid it of my own free will. I had the money to do it.

At this point the respondent offered in evidence a transcript of the account between the taxpayer and the Burlingame Investment Company which was received in evidence as respondent's Exhibit A.

I have already stated that no dividends were ever paid on the stock of the Burlingame Investment Company except to me.

At this point it was stipulated by the parties that there were no sales one way or the other between the parties during the year 1930 except the three that are under consideration in this case. [60]

Asked how I came to make the sales of these three stocks on this particular day December 30, 1930, my answer is that I thought it was an advisable thing to do, to transfer the stocks out of myself over to the Burlingame Investment Company without any idea of profit to myself. I knew at the time that if I made a bona fide sale of this sort I would be entitled to take a deduction from my income tax. I was so advised by my attorney. I admitted to the

(Testimony of Richard S. McCreery.)

Bureau of Internal Revenue agents here in San Francisco that my purpose in making this sale was to save just such deductions on my income tax. Asked how much I saved thereby, my answer is that I transferred some stocks to the Burlingame Investment Company on which I had to pay quite a heavy income tax because it showed a profit, which I paid. So I was not trying to avoid any taxation in that way. I did sell other stocks during 1930 on the open market and my return shows that. I did buy and sell stocks occasionally. The list of all stocks and bonds I bought are all down on the books.

At this point the parties stipulated that in the calendar year 1930 the taxpayer sold on the open market 197 shares of Phillips Petroleum, 940 shares American Radiator, 200 shares American Metals, 220 shares Pacific Lighting, 23 shares of Intercoast Trade. It was further stipulated that the taxpayer claimed a loss on the Phillips Petroleum, the American Radiator, the American Metals, the Pacific Lighting, and on the Intercoast Trade.

In fact I claimed a loss on all of the stocks I sold on the open market in 1930. [61]

My income tax return shows that I claimed a loss of \$72,684.91 from the sale of miscellaneous stocks in 1930. That is shown in my return.

At this point the respondent offered the taxpayer's return in evidence. The return was received in evidence as respondent's Exhibit B over the objection of counsel for the taxpayer upon the

(Testimony of Richard S. McCreery.)

ground that it is incompetent, irrelevant and immaterial to this specific case.

At this point the parties stipulated that the balance sheet of the Burlingame Investment Company showing comparative financial statements as of December 31, 1929 and December 31, 1930, shows, among other things, the following:

#### LIABILITIES

December 31, 1929 (Notes payable of Mary

C. McCreery and R. S. McCreery)      \$51,506.91

December 31, 1930 (Notes payable of Mary

C. McCreery and R. S. McCreery)      59,560.00

It was further stipulated that the market value of the assets of the corporation were approximately as shown upon the balance sheets.

In explanation of the above figures it was agreed that those figures were the total liabilities of the corporation on the date shown other than capital stock, and that the assets at those particular times had a value of at least \$600,000.00 in each of those years.

On my direct examination I have testified that there was no agreement between the Burlingame Investment Company and me as to the repurchase of these stocks.

Q. Turn to your personal ledger under the account Burlingame Investment Company, account No. 7, and under the debit side of that ledger I find certain entries such as 300 shares Western Pacific [62] Railroad Company showing a debit to that account of \$23,842.50 as of April 30, 1926. And a similar entry on the same day, 200 shares of Eastman stock, \$22,000.00. I will ask you why are they on the debit side of that account.



(Testimony of Richard S. McCreery.)

Q. I will ask you why are they on the debit side of that account. I am speaking of these entries.

A. Well, sometimes I am not here all the time in San Francisco. We have a big cattle ranch and I go down there very often and sometimes I put in an order to buy stocks and bonds and perhaps that order can not be filled for some days, and when it was filled I might be away. They sometimes made a mistake and put them down to the Burlingame Investment Company or to me, and I instructed them to buy them for the Burlingame Investment Company or myself and I had them changed.

Q. Your explanation is that those represented mistakes on the part of the broker.

A. Well, mistakes on the part of the broker in a way, if you like, because I was away and they did not remember or know if I had bought them for the Burlingame Investment Company or for myself.

Q. You mean to say they were taken in your name and later transferred to the Burlingame Investment Company.

A. If there was a mistake and they were bought for me, they were transferred at once to the Burlingame Investment Company [63] without any charge at all, at the price I paid for them, no interest or anything else, except accrued interest on the bonds. Mr. Altman, I think you have a list of those things, haven't you?

Q. Now, I find in your personal ledger under the same account, Burlingame Investment Com-



(Testimony of Richard S. McCreery.)

pany, numerous instances of where that same error has occurred. In 1927 I find other entries of the same sort. Standard Oil of California, for example, on January 10, 1928. And all through 1930 I find some Standard Oil of California and Transamerica.

Mr. ALTMAN: Those were the sales he testified to in 1930, those three.

It was here stipulated by the parties that there were no correctional entries later than January 10, 1928.

Q. I am asking you if you make the same explanation for those correctional entries up through January 10, 1928.

A. Yes sir, the same.

I have testified on direct examination that my books show an entry showing each transaction between me as an individual and the Burlingame Investment Company. [64]

Q. Will you point out either in your individual ledger or in the ledger of the Burlingame Investment Company where you were given credit for payment or where the Burlingame Investment Company was given credit for payment of this stock which you say it purchased from you? Strike out as regards you. I mean the Burlingame Investment Company was given credit for payment of this stock to you.

A. Those stocks that I sold to the Burlingame Investment Company did not go through the brokers, to save the brokers' fee. It was a genuine sale.

(Testimony of Richard S. McCreery.)

Q. You say they did not go through the brokers in order to save the brokers' fees.

A. Yes.

Q. They were made direct from you to the corporation.

A. They were.

Q. Never passed through brokers' or anybody else's hands?

A. They had to be transferred. They went through the transfer office and were endorsed. You can see the stock there.

#### Redirect Examination

On cross examination I stated that California stocks were acquired by the Burlingame Investment Company and later I stated stocks outside of California. I wish to correct my testimony to read that the corporation acquired outside stocks.

Mr. ALTMAN: Q. Were you on January 27, 1931 the owner of 1,155 shares of stock of the Southern California Edison Company? To refresh your recollection I will point out to you account No. 42-A in your ledger? [65]

The foregoing question and any answer were objected to by counsel for respondent upon the ground that the period referred to is beyond the date of the taxable period in question and is irrelevant, incompetent and immaterial. The objection was overruled and the witness allowed to answer.

A. Yes, on January 27, 1931, I sold those 1.155

(Testimony of Richard S. McCreery.)

to the Burlingame Investment Company at the market price on that date. There is an entry in account No. 42-A of the ledger dated January 27, 1931, sold 1,155 shares \$49,665.00. That is the entry representing that sale. I did not think that I had made that much profit.

I turn to my personal books and my account with the Burlingame Investment Company and under account No. 7 on my books I find an entry dated January 27, 1931, 1,155 shares Southern California Edison \$49,665.00. That represents a charge I made against the Burlingame Investment Company for the purchase price.

The parties here stipulated that the same entries of sale were made and crediting Mr. McCreery's account with the Burlingame Investment Company with the amount of them, but the correctness of the entries was not stipulated.

My counsel has handed me my individual income tax return for the year 1931. I find under Schedule C therein attached to the return a schedule showing the sale of 105 shares Southern California Edison acquired April 19, 1930, amount realized \$4,515.00, cost \$2,625.00; profit \$1,890.00. Again under Schedule D, I find 1,050 shares Southern California Edison sold during 1931, acquired 1928; amount realized \$45,150.00, cost \$34,145.54, profit \$11,004.35. These two items [66] segregated represent my return for the year 1931 for income tax purposes on the 1,155 shares I have just testified to.

(Testimony of Richard S. McCreery.)

I find on the face of the return tax payable of \$5,024.14. During the year 1932 I paid the full amount of that tax.

Counsel for respondent made the following statement in support of his objection to the testimony relating to the year 1931 as follows:

In the first place, there is no proof of profit; there is no proof of cost; there is no proof that this taxpayer may not have reported this for the purpose of offsetting a great many things which he might have had. There are a great many reasons, in other words, why this taxpayer may have made this transfer in 1931. He may have desired to report profit on that particular transaction. I do not think anything which has been introduced in evidence here today is proof of that cost, proof of the validity, or that it was a bona fide sale. That is all.

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The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue as attorney for the Commissioner of Internal Revenue.

(Signed) ROBERT H. JACKSON,  
Assistant General Counsel for the Bureau of  
Internal Revenue.

The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Ap-

(Testimony of Richard S. McCreery.)

peals, and the same is approved by the undersigned as attorney for the respondent on review.

.....,  
Attorney for Respondent on Review. [67]

The foregoing is all of the material evidence adduced at the hearing and in order that the same may be preserved and made a part of the record, this statement of evidence is duly approved and settled this ..... day of October, 1935.

.....  
Member, United States Board of  
Tax Appeals.

[Endorsed]: Lodged Oct. 29, 1935.

[Endorsed]: Approved and ordered filed this 28th day of Dec., 1935. (Sgd) Logan Morris, Member.  
[68]

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[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of

Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board, including:

(a) Petition, including annexed copy of deficiency letter.

(b) Answer.

3. Opinion and decision of the Board.

4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

5.

(a) Stipulation of facts.

(b) Statement of evidence as settled and allowed.

6. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record.

7. This praecipe.

(Signed) ROBERT H. JACKSON,  
Assistant General Counsel for the  
Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 4 day of November, 1935.

.....  
Respondent.

(Sgd) JOHN C. ALTMAN,  
Attorney for Respondent on  
Review.

[Endorsed]: Filed Nov. 16, 1935. [69]



[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 69, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 13th day of January, 1936.

[Seal]

B. D. GAMBLE,

Clerk, United States Board of  
Tax Appeals.

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[Endorsed]: No. 8105. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Richard S. McCreery, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed January 18, 1936.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

